

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs December 13, 2005

STATE OF TENNESSEE v. DEREK JAMES OSBORNE

Appeal from the Criminal Court for Knox County
No. 74308 Mary Beth Leibowitz, Judge

No. E2004-02723-CCA-R3-CD - Filed May 1, 2006

The Appellant, Derek James Osborne, presents for review a certified question of law. *See* Tenn. R. Crim. P. 37(b)(2)(i). Osborne pled guilty to driving under the influence (“DUI”), first offense, and received an eleven month and twenty-nine day sentence, to be suspended after service of forty-eight hours in confinement. On appeal, Osborne argues that his indictment for DUI was returned outside the twelve-month limitations period for misdemeanor offenses; therefore, the trial court erred in denying his motion to dismiss. On appeal, the State asserts that Osborne’s argument is without merit, and because Osborne failed to properly reserve his certified question, this court is without jurisdiction to hear the appeal. Following review, we agree that the certified question of law was improperly reserved. Accordingly, the appeal is dismissed.

Tenn. R. App. P. 3; Appeal Dismissed

DAVID G. HAYES, J., delivered the opinion of the court, in which JOSEPH M. TIPTON and JAMES CURWOOD WITT, JR., JJ., joined.

Joe M. Felknor, Knoxville, Tennessee, for the Appellant, Derek James Osborne.

Paul G. Summers, Attorney General and Reporter; David E. Coenen, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Zane Scarlett, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

A warrant for the Appellant’s arrest was issued by a Knox County judicial commissioner on June 11, 2000. The affidavit of complaint alleged as follows:

The defendant committed the offense of driving under the influence (First Offense), in violation of TCA Section 55-10-401. This incident occurred on Middlebrook Pike in Knox County, Tennessee on Sunday, June 11, 2000 at about 03:12. EMS advised

dispatch of a late white model Ford pickup with Florida tags (096FBS) Interstate 40 at West Hills. Upon catching up to the vehicle he was observed crossing over the double yellow line west on Middlebrook Pike at Francis Road. The vehicle entered a private driveway where he did not live and was stopped by officers. The vehicle was positioned partially off the drive way in the yard. Upon further investigation the driver was found to have red watery eyes and a smell of an alcoholic beverage on his breath. The defendant upon exiting the vehicle had to lean against his vehicle to keep from falling. The defendant preformed [sic] poorly on three field sobriety test. The defendant blew a .187% on a RBT IV. The defendant stated he had two beers to drin[k]. The defendant also had a TN drivers [sic] license with a lengthy history TN DL #60986878. This did occur in Knoxville, Knox County, Tennessee.

On January 19, 2001, the Appellant was bound over to a Knox County grand jury for the offense of DUI. In February 2002, a two-count indictment was returned against the Appellant charging him with alternate theories of DUI, those being DUI per se and driving under the influence while intoxicated. On July 19, 2002, the Appellant filed a motion to dismiss the indictment upon grounds that the prosecution was not timely commenced within the applicable limitations period. More specifically, the Appellant alleged that the arrest warrant initially charging him with DUI was deficient under Rule 3 of the Tennessee Rules of Criminal Procedure, in that it did not contain factual allegations which constituted the essential statutory elements of the crime. Thus, he argues that because the arrest warrant was void, the Appellant's indictment which was returned twenty months after the date of the offense was time barred. The trial court subsequently denied the Appellant's motion, finding that the warrant adequately informed the Appellant of the charge against him.

On October 12, 2004, the Appellant pled guilty to DUI and received a sentence of eleven months and twenty-nine days, with the sentence being suspended except for forty-eight hours. This appeal followed.

Analysis

In this appeal, the Appellant seeks review of the following certified question of law:

Whether the indictment commencing this prosecution (#74308), filed on 2/21/02, was untimely as no prosecution was validly commenced within the limitation on prosecutions set forth in TCA § 40-2-102 because the warrant (No. @513883) issued in the General Sessions Court of Knox County on 6-11-2000 attempting to commence the defendant's prosecution for the offense of D.U.I. under TCA § 55-10-401 allegedly committed on 6-11-2000 was void ab initio as the Affidavit of Complaint on said Warrant did not comply with Tennessee Rule of Criminal Procedure 3 by containing a written statement alleging that a person committed an offense and alleging the essential facts constituting the offense charged, namely D.U.I. under TCA. § 55-10-401.

Rule 37(b)(2)(i), Tennessee Rules of Criminal Procedure, allows an appeal from a guilty plea in certain cases under very narrow circumstances. An appeal lies from a guilty plea, pursuant to Rule 37(b)(2)(i), if the final order of judgment contains a statement of the dispositive certified question of law reserved by the Appellant, wherein the question is so clearly stated as to identify the scope and the limit of the legal issues reserved. *State v. Preston*, 759 S.W.2d 647, 650 (Tenn. 1988). The order must also state that the certified question was expressly reserved as part of the plea agreement, that the State and the trial judge consented to the reservation, and that the State and the trial judge are of the opinion that the question is dispositive of the case. *Id.* An issue is dispositive when this court must either affirm the judgment or reverse and dismiss. *State v. Wilkes*, 684 S.W.2d 663, 667 (Tenn. Crim. App. 1984). If these circumstances are not met, this court is without jurisdiction to hear the appeal, and it must be dismissed. *State v. Pendergrass*, 937 S.W.2d 834, 837 (Tenn. 1996). The burden is on the Appellant to see that these prerequisites are in the final order and that the record brought to the appellate court contains all of the proceedings below that bear upon whether the certified question of law is dispositive and the merits of the question certified. *Id.*

In *Preston*, our supreme court made explicit exactly what appellate courts require as prerequisites to the consideration of the merits of a certified question of law. With regard to the requirement that the judgment form state the certified question of law, the court stated:

Regardless of what has appeared in prior petitions, orders, colloquy in open court or otherwise, the final order or judgment from which the time begins to run to pursue a T.R.A.P. 3 appeal must contain a statement of the dispositive certified question of law reserved by defendant for appellate review and the question of law must be stated so as to clearly identify the scope and the limits of the legal issue reserved.

Preston, 759 S.W.2d at 650. In many cases, the State, defendant, and trial court have all agreed, as evidenced by the guilty plea transcript, that the question is certified properly, only to have the State correctly argue on appeal that the certification was not in compliance with *Preston*, which requires dismissal of the appeal because this court cannot assume jurisdiction of a matter upon the agreement of the parties. *Wilkes*, 684 S.W.2d at 667. In *State v. Irwin*, 962 S.W.2d 477, 479 (Tenn. 1998), our supreme court did relax the *Preston* standard somewhat by allowing a certified question to be set out in an independent document and such document to be incorporated by reference into the judgment. However, decisions of this court have made clear that such incorporated document must be referenced on the face of the judgment. *State v. Curtis Emmanuel Lane*, No. E2004-02340-CCA-R3-CD (Tenn. Crim. App. at Knoxville, Nov. 2, 2005). In *State v. Armstrong*, 126 S.W.3d 908, 912 (Tenn. 2003), our supreme court again reiterated that substantial compliance with the dictates of *Preston* is not sufficient to properly certify a question of law.

On appeal, the State argues that the Appellant failed to reserve his certified question based properly upon a lack of compliance with the requirements of Rule 37(b)(2)(i)(A). Specifically, the State contends that judgment of conviction does not contain a statement of the certified question of law reserved by the Appellant for appellate review and, additionally, that the judgment does not refer

to any other document which contains the question. We agree with the State, as the judgment of conviction contains no reference whatsoever to the plea being conditioned upon a certified question of law.

Our review indicates that the only document in the record referencing the certified question of law is the Appellant's "Request for Acceptance of Plea of Guilty" form. However, even within that document there is no statement which indicates that the parties and the trial court agree that the certified question is dispositive of the case. Review of the transcript of the guilty plea hearing reflects that all parties agreed to certify the question, and, in fact, the trial court even states on the record that the guilty plea document containing the question is incorporated by reference. However, as noted, this is insufficient to comply with Rule 37. The judgment must contain the certified question or make explicit reference to a document where the certified question is recited. As the Appellant has failed to carry his burden to properly comply with the requirements of Rule 37, we are without jurisdiction to entertain this appeal. Accordingly, the appeal is dismissed.

Notwithstanding dismissal of the appeal, our review of the facts contained in the affidavit of complaint establishes a sufficient factual basis to support a finding that probable cause existed for issuance of the warrant and the Appellant's arrest for DUI. *See* Tenn. R. Crim. P. 3. Because the arrest warrant complied with Rule 3, the State's prosecution of the case was timely.¹

CONCLUSION

Based upon the foregoing, we conclude that the certified question before us was not properly reserved. Thus, because the question of law is not properly before this court, we dismiss for lack of jurisdiction.

DAVID G. HAYES, JUDGE

¹The Appellant's underlying challenge in this appeal lies with his claim that the arrest warrant was void in that it contained insufficient facts to support the charge of DUI. We are constrained to note, however, that the Appellant's guilty plea stems from an indictment, not the challenged arrest warrant, and, at no time prior to being bound over to the grand jury did the Appellant challenge the arrest warrant's validity. Even assuming for argument's sake that the arrest warrant was invalid, the indictment in this case would have "cure[d] all defects emanating from the first arrest and charging procedure." *State v. Campbell*, 641 S.W.2d 890, 893 (Tenn. 1982).